No. 88-192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MCKESSON CORPORATION,
Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF ON REARGUMENT OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION; JOINED BY THE MULTISTATE TAX COMMISSION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

BENNA RUTH SOLOMON *
Chief Counsel
CHARLES ROTHFELD
STATE AND LOCAL LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
* *Counsel of Record for the* Amici Curiae

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QUESTIONS PRESENTED

The Court's July 3, 1989, order directed the parties in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, No. 88-192, to brief the following questions:

1. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?

2. May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?

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INTEREST OF THE *AMICI CURIAE*

The institutional interest of *amici* in cases affecting state and local governments is set out in the first brief that we filed in this case.[1] We add only that a partial survey of the States conducted this summer by *amicus* Multistate Tax Commission found that 30 States potentially are liable for more than $6.5 billion in refunds on constitutionally based claims. Because these claims will proceed in state court under state causes of action pursuant to state waivers of sovereign immunity, the States have a compelling interest in the use of their own remedial rules in their adjudication. *Amici* therefore submit this brief to assist the Court in the resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

We do not suggest that state courts either do or should routinely deny refunds to taxpayers who pay taxes that subsequently are held to be unconstitutional; to the contrary, as we explained in our first brief, state courts typically make refunds available as a matter of course in such circumstances. In our view, however, the availability against a State of retrospective monetary relief in a state cause of action adjudicated in state court should be determined by state, rather than federal, law.

1. As an initial matter, the Constitution does not generally guarantee the availability of monetary relief for violations of federal constitutional or statutory law. From its inception, our system has recognized sovereign and official immunities that may make it impossible for injured parties to obtain money damages. Against this background, petitioners' peculiar argument that there is a special constitutional right to the refund of taxes that are collected in violation of the Constitution is without merit. Not surprisingly, the decisions that petitioners cite for this proposition either are inapposite or are inconsistent with modern law.

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[1] The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk.

2. Whether a refund is available in a suit such as this one is a matter of state law. The decision whether to waive sovereign immunity and permit an action for a refund in the first instance is constitutionally committed to the State. Related, subsidiary issues—the scope of the State's waiver, the meaning of procedural and substantive limitations on relief (such as statutes of limitations), the availability of particular elements of relief (such as interest)—necessarily also are committed to the State. By the same token, the interpretation of other remedial rules, such as those governing retrospectivity, should be matters of state law to be settled by the state courts. That this Court has mandated the use of particular injunctive remedies (such as the exclusionary rule) to effectuate constitutional rights in other settings is beside the point here: in the context of suits against a sovereign for money damages, the Constitution itself permits the States (or the United States) to determine the scope of available relief.

3. Even if the availability of money damages in a state court action against a State is not *necessarily* a matter of state law, compelling prudential considerations militate against the implication of a damages remedy from the Constitution. Any federal court, including this one, should be reluctant to take the unprecedented step of authorizing monetary relief against a State in a case where the state courts believe money damages unavailable—particularly when *Congress* has chosen not to make States generally liable for the violation of constitutional rights. Institutional considerations also suggest that the Court should hesitate before constitutionalizing the rules governing money damages, a course that would require the Court to assess the constitutionality of every state retroactivity and remedial rule.

Nothing in the Commerce Clause requires the Court to take such a step. When a constitutional challenge involves the denial of equal treatment—that is, when the State had the authority to impose the challenged tax on the plaintiff at the challenged level, and erred only in

not *also* taxing someone else at that level—this Court generally has found a prospective remedy adequate to effectuate the Constitution. And the adequacy of prospective relief is particularly apparent in the Commerce Clause context: because the Clause was not designed to protect individuals, nothing in its policies should move the Court to override the State's decision to withhold monetary relief.

4. Finally, if the Commerce Clause does require retrospective equalization as a remedy, a retroactive increase in the taxes of those benefitted by the discrimination may be a proper form of relief. Retroactive legislation does not, by its nature, violate the Fourteenth Amendment: the Court has made clear that the requirements of due process are satisfied so long as the retroactive law furthers a legitimate state purpose by rational means. In the tax setting, a variety of considerations bears on whether retroactive legislation is constitutional: whether the legislation simply raised the rate of an existing tax; whether the tax was imposed on a profitable transaction rather than a gift; and whether the new tax could have been anticipated. While application of these factors suggests that a retroactive tax on the beneficiaries of Florida's unconstitutional tax preference would satisfy due process requirements, in our view the Court should not now definitively settle the constitutionality of such a tax; if the Court believes retrospective equalization nececessary, it would be enough to leave use of a retroactive tax available as an option for the State on remand.

ARGUMENT

Like the American Trucking Associations ("ATA") petitioners, we believe that the way in which the Court has framed the issues on reargument prompts several preliminary observations. As an initial matter, we note that the Court may dispose of this case—and its companion, *American Trucking Associations, Inc. v. Smith*, No. 88-325 (*"ATA"*)—without definitively answering the complex question whether the Constitution, of its own

force, ever requires retrospective monetary relief for violations of "clearly established law under the Commerce Clause." Whether or not there are cases in which a constitutional refund requirement may be imposed, respondents' brief on reargument advances compelling equitable reasons against the use of such a remedy here. In *ATA*, meanwhile, respondents have demonstrated that there simply was no violation of "clearly established" Commerce Clause doctrine on the part of the State.

We also note that the Court's first question, which posits a taxpayer that has paid the challenged tax "under protest," presupposes compliance with the procedural and substantive requirements of state law. This is an important presupposition; again, whatever the remedial mandate of federal law in other settings, refunds plainly are not available to taxpayers who fail to comply with state statutes of limitations or rules requiring notice and payment under protest. The ATA petitioners frankly acknowledge this point (Br. 6-7),[2] which was settled by one of the cases upon which both sets of petitioners principally rely. *Ward v. Love County*, 253 U.S. 17, 22, 25 (1920). There is no novelty to this conclusion: the Court has made clear in a variety of settings that preservation of a federal constitutional claim may be conditioned on compliance with nondiscriminatory state procedural rules. See, *e.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 262-263 (1982); *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

Finally, it is important to bear in mind that the Court's first question on reargument is directed only at cases in which the State has violated *"clearly established* law under the Commerce Clause." This is a significant and, in our view, sensible limitation on the inquiry. Whether or not the Constitution mandates refunds when the unconstitutionality of the state tax statute was clear at the time of enactment, we demonstrated in our first brief (at 12-16) that compelling reasons of policy make

[2] All citations to briefs refer to briefs filed on reargument unless otherwise noted.

it inappropriate to use a federal refund remedy against state and local government defendants for the violation of what had been unsettled federal law. See *Lemon v. Kurtzman*, 411 U.S. 192, 207-209 (1973) (plurality opinion) (*"Lemon II"*); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1106-1107 (1983). On reargument, however, both sets of petitioners have simply ignored this limitation on the question posed by the Court, arguing gamely, as they did in their first round of briefs, that the availability of a refund under the Commerce Clause is controlled by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). As in their first briefs, however, petitioners offer absolutely no reason to believe that use of the *Chevron* retroactivity test is constitutionally compelled; neither set of petitioners has cited a single decision of this Court mandating the use of *Chevron* by state courts adjudicating state causes of action, and we are aware of none. In fact, as we explain in our first brief (at 11-12), *Chevron*—a case involving the rules to be applied in federal courts judging federal causes of action—is inapposite here. We therefore turn to the first question actually posed by the Court: whether a State must provide retrospective monetary relief to a taxpayer who pays a tax that is found to violate clearly established law under the Commerce Clause.

I. THE CONSTITUTION DOES NOT REQUIRE A STATE TO PAY RETROSPECTIVE MONETARY RELIEF WHEN STATE TAX STATUTES ARE HELD UNCONSTITUTIONAL.

A. The Constitution Does Not, Of Its Own Force, Make Monetary Relief Available Against States.

1. As we demonstrated in our first brief (at 6-7), the Constitution does not, as a general matter, require the use either of retroactivity or of particular refund remedies for violations of federal constitutional or statutory law. Perhaps the Court's most oft-quoted statement on the point is its declaration that " 'the federal Constitution has no voice upon the subject' of retrospectivity" (*United States v. Johnson*, 457 U.S. 537, 542 (1982),

quoting *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932)); the Court has applied this understanding in a wide range of constitutional and statutory settings,[3] including those in which plaintiffs sought monetary relief.[4] Petitioners do not, and could not, take issue with these observations.

Indeed, while it may be that full compensation would be available for every wrong "[i]n the best of all possible worlds" (*Parratt v. Taylor*, 451 U.S. 527, 531 (1981)), the Constitution never has been understood to guarantee monetary relief as a remedy for all constitutional violations. From its inception, our system has recognized sovereign and official immunities that may make it impossible for injured parties to obtain money damages. The United States and (as we explain below) the individual States always have been permitted to assert sovereign immunity—a doctrine that has constitutional stature—as a defense to claims for retrospective monetary relief, whether or not those claims are grounded on the Constitution. See generally *United States v. Mitchell*, 445 U.S. 535 (1980); *Sherwood v. United States*, 312 U.S. 584 (1941). And this Court itself has created the extensive series of official immunities that sometimes bar the award of money damages against government officials for constitutional violations. See, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635 (1987); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou*, 438 U.S. 478 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978). See also *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367, 372-373 & n.9 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983).

[3] See, *e.g.*, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142 (1976); *Lemon v. Kurtzman*, 411 U.S. 192, 198-199 (1973) ("*Lemon II*"); *Connor v. Williams*, 404 U.S. 549, 550-551 (1972); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969); *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969).

[4] See, *e.g.*, *Florida v. Long*, 108 S.Ct. 2354 (1988); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983).

2. Against this background, petitioners make the surprising and peculiar argument that there is a special constitutional right to the refund of state taxes that were collected in violation of the Constitution or federal law. McKesson Br. 8-14; ATA Br. 8-11. Petitioners leave unclear the source of this right; petitioner McKesson refers generally to "equitable remedial principles" (Br. 13), while petitioner ATA advances a general "federal right to retrospective relief." Br. 9. Petitioners nevertheless cite what ATA describes as "a long line of this Court's decisions" that assertedly "require[] disgorgement of taxes exacted in violation of the Constitution." Br. 8. In fact, however, ATA's "long line" of cases began in 1912 and ended in 1939, neatly transecting the *Lochner* era. And on examination, virtually none of the cited decisions even arguably stands for the proposition that the Constitution requires the refund of illegal taxes.[5]

[5] The following are the decisions cited by McKesson, ATA, or both: *Atchison, T. & S.F.R.R. v. O'Connor*, 223 U.S. 280, 287 (1912), was a refund action brought in federal court; the Court noted that the State permitted actions for taxes mistakenly paid and "presume[d] that a judgment [of unconstitutionality] in the present action would satisfy the [state] law." The language from the opinion quoted by petitioner McKesson (Br. 9) was addressed, not to the general availability of refunds, but to the question whether the taxpayer should be deemed to have paid under protest. See 223 U.S. at 285. *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499 (1928), while referring to a "legal right" to a refund (*id.* at 504), leaves entirely unclear whether the Court had in mind a state or a federal right, and certainly does not locate the source of any such federal right; in any event, the Court left open the possibility that discrimination may be cured by prospectively raising tax rates of the favored class. *Id.* at 505. The decision in *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931), also a refund action, similarly leaves unclear whether the Court had in mind federal or state refund rights, notes that discrimination may be cured by the collection of "additional taxes from the favored competitors," and stands principally for the proposition that a taxpayer who has suffered discrimination cannot, as his only remedy, "be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." *Id.* at 247. In *Jackson County Board v. United States*, 308 U.S. 343, 352 (1939),

In our view, the only two decisions cited that offer petitioners even cold comfort are *Ward v. Love County*, *supra*, and *Carpenter v. Shaw*, 280 U.S. 363 (1930). Both decisions contain language suggesting that a refusal to refund taxes collected in violation of federal statutory law denies the taxpayer due process under the Fourteenth Amendment. *Ward*, 253 U.S. at 24; *Carpenter*, 280 U.S. at 369. There is considerable doubt, however, that *Ward* and *Carpenter* were in fact grounded on the federal Constitution.[6] And as we explained in our first brief

the county's liability for back taxes was not contested; the only issue before the Court was the availability of interest on those back taxes—and the Court, stating that persons asserting federal rights "are not to have a privileged position over other aggrieved taxpayers in their relation with the states or their political subdivisions," held interest *unavailable*. And *District of Columbia v. Thompson*, 281 U.S. 25, 31-32 (1930), was an action brought in federal court; the Court held that a federal common-law right of action was available under a quasi-contract theory when the District failed to provide benefits for which it had levied an assessment.

Petitioner McKesson cites two additional cases. *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 109 S.Ct. 633 (1989), makes no reference to the availability of refunds; citing *Iowa-Des Moines*, the Court held only that a taxpayer whose property was overassessed "may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised." *Id.* at 639. *Maryland v. Louisiana*, 452 U.S. 456 (1981), was an original action in this Court brought by several States and the United States, and plainly has no applicability beyond that setting.

[6] Petitioner ATA asserts (Br. 15-16 n.7) that commentators have read *Ward* for the proposition that the Constitution requires the refund of taxes collected in violation of federal law. In fact, however, Professor Field—whose article is cited by petitioners for this point (*ibid.*)—explains that Justice Van Devanter's opinion for the Court in *Ward* "did not squarely base its holding on the United States Constitution." Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883, 972-973 n.394 (1986). Noting that the opinion discussed state law (see 253 U.S. at 24), Professor Field described "[t]his intermix of state and federal elements and the confusion whether the Court was interpreting state or federal law." Field, *supra*, 99 Harv. L. Rev. at 972-973 n.394. Professor Field herself explains *Ward* in modern terms as resting on the "federal ability to reject the 'aberrant state rule.'" *Ibid.* For its part, *Carpenter* simply relied on *Ward*. See 280 U.S. at 369.

(at 8), those doubts are confirmed by decisions rendered both before and after *Ward* indicating that States may assert their sovereign immunity to preclude federal constitutional claims for money damages in state court. See *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929); *Palmer v. Ohio*, 248 U.S. 32, 34 (1918); *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911); *Cunningham v. Mason & Brunswick R.R.*, 109 U.S. 446, 451 (1883); *Railroad Co. v. Tennessee*, 101 U.S. 337, 339 (1880); *Beers v. Arkansas*, 61 U.S. (20 How.) 528, 529 (1858).

Moreover, if *Ward* and *Carpenter* were meant to rest on the Fourteenth Amendment, their understanding of substantive due process has not stood the test of time.[7] Since deciding *Carpenter*, this Court has not cited either decision for the proposition that the Fourteenth Amendment compels States to refund illegally collected taxes.[8] To the contrary, as we noted in our first brief (at 8-9) (and as petitioners do not deny), this Court in recent years expressly has left it to the state courts to determine the availability of a refund after invalidating a state tax under the Supremacy Clause—the very constitutional violation at issue in *Carpenter*. *E.g.*, *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196-197 (1983). In other decisions, the Court simply has remanded cases to the state courts so that they might determine the availability of refunds for unconstitutional taxes, often on the seeming assumption that the answer to that question

[7] We note that *Ward*'s substantive holding—that Congress was not empowered to repeal a tax exemption because doing so would disturb vested property rights—is also of questionable vitality. See, *e.g.*, *Flemming v. Nestor*, 363 U.S. 603 (1960).

[8] The ATA petitioners were able to find two lower court decisions citing *Ward*. Br. 8-9. Whatever the validity of these decisions on their own terms, they are not relevant here. In one case (*United States v. State Tax Comm'n*, 645 F.2d 4, 5 (5th Cir.), cert. denied, 454 U.S. 896 (1981)) the plaintiff was the United States, and in the other (*Gallagher v. Evans*, 536 F.2d 899, 900-901 (10th Cir. 1976)) the defendant was not a State. As a result, neither case presented Eleventh Amendment or sovereign immunity issues.

turned on state, rather than federal, law. See, *e.g.*, *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890, 895-896 (1989) (plurality opinion)[9]; *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987); *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232 (1987); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276-277 (1984).[10]

The other authority advanced by petitioner ATA in support of the asserted federal right to retrospective monetary relief is plainly inapposite. *Owen v. City of Independence*, 445 U.S. 622 (1980) (cited at Br. 9-10), as we explained in our first brief (at 13), involved the construction of 42 U.S.C. § 1983, and therefore turned on Congress's intent in enacting a particular federal statute;

[9] In *Texas Monthly*, which involved a secular publication's First Amendment challenge to a tax exemption granted religious entities, the State argued that the taxpayer lacked standing because, if it prevailed on its constitutional claim, the exemption simply would be invalidated. Relying on *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), the Court rejected the State's argument as a matter of standing law, explaining that the availability of a refund was a disputed question of state law that would remain at issue after the decision of the federal constitutional question. But the Court noted that, if the State's reading of its own law was correct, the taxpayer "cannot obtain a refund of the tax it paid under protest," and added that "[i]t is not for [the Court] to decide whether the correct response as a matter of state law to a finding that a state tax is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether." 109 S.Ct. at 895-896 (plurality opinion).

[10] The ATA petitioners argue (Br. 11) that the Court in *Bacchus* recognized the requirement that some form of retrospective relief be made available. But the footnote they cite for this proposition, like the portion of *Texas Monthly* discussed above (see note 9, *supra*), simply rejected a state challenge to the taxpayer's standing. 468 U.S. at 267-268 n.7. The Court in *Bacchus* separately and expressly addressed the question whether "if the tax was illegally discriminatory the Commerce Clause requires that the taxes collected be refunded"; the Court declined to resolve this "issue[] of remedy," remanding the case to the state courts for that purpose. *Id.* at 277.

the decision says nothing about what the Constitution demands of state courts in state causes of action. The decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (cited at Br. 10), expressly turned on the language and uniquely self-executing nature of the Just Compensation Clause, which secures a right to "*compensation* in the event of * * * a taking" (*id.* at 315) (emphasis in original) and may overcome even the sovereign immunity of the United States. Cf. *Library of Congress v. Shaw*, 478 U.S. 310, 317 n.5 (1986). Indeed, the presence of such language in the Fifth Amendment—and in that Amendment alone—suggests that the other provisions of the Constitution were *not* designed to make monetary relief available of their own force.[11]

B. The Availability Of Monetary Relief Against A State In A State Cause Of Action In State Court Is A Matter Of State Law.

With this underbrush cleared away, we are in a position directly to address the Court's first question. We note that this question—which postulates a violation of clearly established law—hypothesizes the hardest case for the State. But having said that, our answer is that there is no *federal* right to a refund of unconstitutional taxes even in the circumstances posed by the Court. Instead, as we argued in our first brief (at 16-25), the scope of the monetary remedy available in state court on a state cause of action against the State is a matter of state law.

While the ground advanced by petitioner McKesson in seeking a refund was the inconsistency of the challenged tax with the Commerce Clause, McKesson's cause of action did not spring full-blown from the federal Constitution. Instead, the petitioners both in this case and in *ATA* proceeded in state court under state causes of ac-

[11] Although the ATA petitioners attempt to draw support from the Just Compensation Clause (Br. 24), neither set of petitioners has argued to this Court that the challenged taxes actually amounted to "takings" in the constitutional sense.

tion. As petitioners concede (ATA Br. 6-7), plaintiffs in state court are bound by state procedural rules (such as exhaustion of remedies requirements) and by at least some substantive limitations on the availability of relief (such as statutes of limitations), the interpretation of which surely are matters of state law. In our view, the other procedural and remedial rules that govern the conduct of such lawsuits, including the rules concerning retrospectivity, must similarly be matters of state law. This conclusion certainly is suggested by the Court's repeated decisions leaving it to the States to formulate remedies for the collection of unconstitutional taxes. But more than that, in our view the use of state remedial rules in a state court lawsuit for money damages against a State is compelled by the nature of state sovereign immunity.

1. At the outset, we think it plain that States may assert their sovereign immunity in their own courts against claims for money damages that are advanced in state-created causes of action, even if the claims are grounded on the federal Constitution. Since the foundation of the Union, it has been "an 'established principle of jurisprudence' that the sovereign cannot be sued in its own courts without consent.'" *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2310 (1989), quoting *Beers*, 61 U.S. (20 How.) at 529. See *Nevada v. Hall*, 440 U.S. 410, 420 (1979); *id.* at 431 (Blackmun, J., dissenting). While the specific question whether that immunity applies to federal claims advanced against the States in state court has been infrequently litigated, on those occasions when the Court has reached the issue it consistently has indicated that "without [a State's] consent it cannot be sued in any court, by any person, for any cause of action whatever." *Hopkins*, 221 U.S. at 642. See cases cited at page 9, *supra*. Indeed, while the amenability of States to suit in federal court under Article III was debated extensively at the time of the Constitution's ratification (see *Welch v. Texas Dept. of Highways & Public Transportation*, 483 U.S. 468, 480-484

(1987) (plurality opinion); *id.* at 504-507, 511-513 (Brennan, J., dissenting); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 263-280 (1985) (Brennan, J., dissenting)), we are aware of no suggestion during those debates that state courts were obligated by the Constitution to entertain claims against States for money damages. See generally *ibid.* And that is hardly surprising: it was and is a fundamental tenet of sovereign immunity that, wherever else it may be hauled into court, "no sovereign may be sued in its own courts without its consent." *Hall*, 440 U.S. at 416.

This view is confirmed by the modern understanding of the Eleventh Amendment, which of course bars federal courts from entertaining claims for money damages against the States (including claims for the refund of unconstitutional taxes). See *Kennecott Copper Co. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 (1944). See generally *Papasan v. Allain*, 478 U.S. 265, 278 (1986); *Edelman v. Jordan*, 415 U.S. 651, 668-669 (1974). While the Court has debated the meaning of the Amendment at length in recent years, it is clear that at least five Justices now accept the rule of *Hans v. Louisiana*, 134 U.S. 1 (1890), which rests on the proposition that suits against unconsenting States were "unknown to the law" at the time of the Constitution's ratification (*id.* at 15). These Justices thus recognize that the Eleventh Amendment applied to Article III of the Constitution (and to the federal courts) "'the fundamental principle of sovereign immunity'" that prevailed at that time. *Welch*, 483 U.S. at 472 (plurality opinion), quoting *Pennhurst State School & Hospital v. Halderman*, 473 U.S. 89, 98 (1984). See *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Atascadero*, 473 U.S. at 238.[12]

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[12] See *Dellmuth v. Muth*, 109 S.Ct. 2397, 2401 n.2 (1989) (declining to overrule *Hans*); *Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273, 2295 n.8 (1989) (opinion of White, J.) (stating that *Hans* should not be overruled); *id.* at 2298-2299 (opinion of Scalia, J.)

This view of state sovereign immunity is fully consistent with the Court's most recent Eleventh Amendment decision, *Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273 (1989), in which a splintered Court held that Congress may override the States' Eleventh Amendment immunity when exercising its power under the Commerce Clause. The plurality reasoned that, "in approving the commerce power, the States consented to suits against them based on congressionally created causes of action." 109 S.Ct. at 2285 (plurality opinion). But as this language itself indicates, the four Justices in the plurality accepted the existence of state sovereign immunity even in *federal court* in the absence of congressional action. See, *e.g.*, *id.* at 2284 (emphasis added) ("Congress has the authority to *override States' immunity* when legislating pursuant to the Commerce Clause"). The four Justices in dissent, meanwhile, read the Eleventh Amendment as reflecting "a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted." *Id.* at 2297 (opinion of Scalia, J.). Needless to say, neither these opinions, nor Justice White's separate opinion, suggested that state courts need entertain actions against States that cannot be brought in federal court.[13]

(stating that *Hans* should not be overruled). Justice White joined the plurality opinion in *Welch*, while the Chief Justice and Justices O'Connor, Scalia, and Kennedy seemingly have endorsed that opinion. See *Union Gas*, 109 S.Ct. at 2297-2298 (opinion of Scalia, J.). The *Welch* plurality opinion therefore appears to express the views of a majority of the Court.

[13] Citing *General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908), the ATA petitioners suggest (Br. 13) that a State may not assert its sovereign immunity in its own courts against federal constitutional claims. But *Crain*—which predated many of the cases we cite above—is slender authority for such a profound proposition, "for more reasons than just the age and moderate obscurity of the case." Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1095-1096 (1983). *Crain* was an action brought in state court against a state official seeking injunctive relief for an asserted violation of the Commerce Clause. This Court rejected the State's argument that its courts lacked jurisdiction to hear the claim, reasoning that the Eleventh Amendment would make injunctive relief unavailable in federal court and that there must be some means of enforcing the Constitution in some court. 209 U.S. at 226-227. Because the Court went on to reject the Commerce Clause claim on the merits, the jurisdictional issue might not have been carefully analyzed. In any event, the suit was not one for monetary relief. And the proposition upon which the Court grounded its jurisdictional discussion—that the Eleventh Amendment would bar a federal court from entertaining a claim against a state official for prospective relief—plainly no longer is valid (even if it was at the time *Crain* was decided). Indeed, Justice Harlan concurred separately, maintaining that the existence of jurisdiction "certainly is a state, not a federal question. Surely, [the State] has the right to say of what class of suit its own courts may take cognizance." *Id.* at 233 (Harlan, J., concurring). Not surprisingly, "[n]o modern case has held that state courts have an obligation to hear claims barred from the federal courts by the eleventh amendment." Fletcher, *supra*, 35 Stan. L. Rev. at 1096. The only decision other than *Crain* cited by petitioners, *Private Truck Council v. New Hampshire*, 517 A.2d 1150, 1156 (N.H. 1986), involved a state court's interpretation of its own common law.

By ratifying the Constitution, the States thus did not consent (in the absence of congressional action) to the assertion against them of constitutional claims in federal court. This being so, it is difficult to imagine why, by the same ratification, they should be understood to have taken the unlikelier step of irrevocably waiving the fundamental protection of sovereign immunity against constitutional claims in their own courts. That the States did not take such a step has been the clear understanding of the Court, which has emphasized that States *may* supplement whatever remedies for constitutional violations are available in federal court by "waiving their immunity from suit in state court on state-law claims." *Welch*, 483 U.S. at 488 (plurality opinion) (footnote omitted). See *Will*, 109 S.Ct. at 2320 (Brennan, J., dissenting). And this conclusion is only logical. The United States, after all, is bound by the Constitution to the same extent as are the States, yet it is not amenable to suit on constitutional claims in its own courts absent a waiver of im-

munity. Cf. *Union Gas*, 109 S.Ct. at 2298 (opinion of Scalia, J.).

2. Petitioners contend (McKesson Br. 7; ATA Br. 14-15) that, if a State chose not to create a cause of action to remedy the collection of unconstitutional taxes, a federal remedy would be available directly under the Commerce Clause on the theory of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); the ATA petitioners blithely go on to assert that "[w]hether a taxpayer seeks prospective or retrospective relief for a Commerce Clause violation, the cause of action is precisely the same." Br. 14-15. This contention plainly is incorrect: for sovereign immunity (and Eleventh Amendment) purposes, the distinction between prospective injunctive and retrospective monetary relief is fundamental. Whether or not a *Bivens* action is available in federal court against state officials for prospective relief under the Commerce Clause, the Eleventh Amendment—a textual limitation on suit in federal court that trumps the *Bivens* remedy—would bar a federal court from awarding money damages.[14] The availability of an action in state court under a *Bivens* theory, meanwhile, is a matter of state law, and state sovereign immunity rules would be fully applicable in such an action.[15]

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[14] The ATA petitioners may mean only that the *Bivens* "cause of action" is available in some theoretical sense, even though monetary relief could not be granted under that cause of action. See ATA Br. 12, citing *Davis v. Passman*, 442 U.S. 228 (1979). Cf. *United States v. Stanley*, 483 U.S. 669, 684-685 (1987). But whether the Eleventh Amendment is viewed as a jurisdictional bar or a limitation on remedy, the outcome is the same: money damages against a State are not available under a *Bivens* theory.

[15] The Court has explained that it is "[t]he federal courts' statutory jurisdiction to decide federal questions" under 28 U.S.C. § 1331 that "confers adequate power to award damages to the victim of a constitutional violation" on a *Bivens* theory. *Bush v. Lucas*, 462 U.S. 367, 378 (1983). See *id.* at 374; *Bivens*, 403 U.S. at 395-396; *Bell v. Hood*, 327 U.S. 678, 684 (1946). Whether the state statutes creating the jurisdiction of state courts confer similar power on those courts is a matter for the States.

3. Rather than argue that the States cannot assert their sovereign immunity against Commerce Clause claims, petitioners principally contend that, because Florida permits refund actions in state court, it *has not* asserted its immunity here. McKesson Br. 7; ATA Br. 13. Considerations of sovereign immunity, however, fundamentally bear on the question whether the availability of particular forms of relief is a matter of federal or of state law. We ground this conclusion on several propositions.

First, the interpretation of state law is conclusively committed to the state courts, whose determinations may not be reviewed by this Court. At least where the state law is procedural in nature, a state court's decision based on that law is unreviewable in this Court, even if application of the state law prevents the effectuation of a federal right. See, *e.g.*, *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). As we have noted, petitioners acknowledge that this principle may be applied in the tax refund setting to rules mandating payment under protest or exhaustion of administrative remedies; the interpretation of these requirements plainly is a matter of state law.

Second, petitioners themselves recognize that some state law substantive limitations on the scope of relief, such as statutes of limitations—which in Florida's case makes it impossible to remedy constitutional violations that occurred more than three years prior to the accrual of the right to seek a refund (see Fla. Stat. § 215.26(2))—may be applied to limit the availability of tax refunds. Similarly, limitations on the State's waiver of sovereign immunity (such as a restriction on the availability of relief for competitive injury or on the maximum amount of permissible recovery against the State) may curtail a taxpayer's ability to obtain a refund on federal grounds; other matters of remedy, such as the availability of interest on refunds, also are aspects of the State's waiver of sovereign immunity. Cf. *Library of Congress v. Shaw*, 478 U.S. 310 (1986). The meaning

(and applicability in any given case) of these state law restrictions on the availability of relief surely may be settled by state courts according to their own rules. This Court could not, for example, review a state court's holding that the waiver of immunity does not extend to damages for competitive injuries. Cf. Resp. first Br. 20 n.20; *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912, 918-919 (Fla. 1985).

Third, in our view the holding below is not an interpretation of the Commerce Clause; fairly read, we think that the decision of the Florida Supreme Court is an application of state remedial rules that preclude the award of retroactive relief when, in light of all the circumstances, retroactivity would be inequitable.[16] And the application of remedial rules relating to retrospectivity, like the other limitations on relief mentioned above, should be a matter of state law to be settled by the state courts. After all, it surely would be anomalous to hold that whether the State has waived immunity is a matter of state law, that the procedures used to adjudicate actions under that waiver are matters of state law, that limits on remedies relating to interest, the period for which relief is available, or permissible amounts of recovery are matters of state law—but that the closely related retrospectivity rules used in such actions are matters of federal law to be created by this Court. In our view, all of these rules, whether codified by the state

[16] The court's analysis of retroactivity made no mention of Commerce Clause policies. Instead, the court discussed equitable considerations—in particular, petitioner McKesson's pass-through of the challenged tax to its customers—and cited one state decision and one decision of this Court (*Lemon II*) for their general retroactivity principles. Pet. App. 21a. We note that the State, in opposing retroactivity before the court below, cited *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), which established the principle that state courts may apply their own retroactivity rules. See No. 70,368 C.A. Br. 29. It therefore does not "fairly appear[] that the state court rested its decision primarily on federal law" (*Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983)); the court below plainly did not believe that this Court's decisions "compel[led] the result." *Id.* at 1041.

legislatures or developed incrementally by the state courts as a matter of common law, are elements of the State's waiver of immunity that limit the extent to which monetary relief is available in state causes of action.

Of course, it may well be that, in other settings, States may not rely on substantive state law rules that frustrate the effectuation of federal rights; a State could not, for example, apply a law precluding use of the exclusionary rule in its courts. And as a general matter, it ultimately is for this Court to determine whether particular forms of relief are necessary to remedy violations of the federal Constitution. See *Bush*, 462 U.S. at 374 & n.12. But in the particular context of suits against a sovereign for money damages, the Constitution itself permits the States (and the United States) to determine the scope of available relief. The interpretation of state rules setting these limits are matters of state law to be decided by the state courts. This Court accordingly should not disturb the Florida Supreme Court's application of its normal rules of retroactivity to petitioner McKesson's claim.[17]

4. This approach plainly does not render the Commerce Clause unenforceable, as petitioners seem to suggest. See ATA Br. 14. The States have in fact opened their courts to claims for tax refunds grounded on the federal Constitution and, as we noted in our first brief

[17] This Court may, of course, intervene to prevent state courts from distorting state law for the purpose of frustrating federal rights. See, *e.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 262-263 (1982). But petitioners have made no contention that the court below took such action. Indeed, petitioners themselves cite cases in which the Florida courts awarded refunds on federal claims. McKesson Br. 7; ATA Br. 11-12. We also note that this is not a case in which the State is alleged to have discriminated against federal claims in favor of similar state-law actions, either in the waiver of its immunity or in the application of its remedial rules. Cf. *Will*, 109 S.Ct. at 2320 (Brennan, J., dissenting); *Testa v. Katt*, 330 U.S. 386 (1947). Nor is this a case where the State is attempting to impose limitations on a cause of action created by Congress. Cf. *Felder v. Casey*, 108 S.Ct. 2302 (1988). See generally *Employees v. Missouri Dept. of Public Health & Welfare*, 411 U.S. 279 (1973).

(at 20 & n.13), state courts routinely award monetary relief on these claims. In any event, federal courts stand ready to provide declaratory or injunctive relief to terminate Commerce Clause violations.[18] See *Will*, 109 S.Ct. at 2311 & n.10; *Welch*, 483 U.S. at 488; *Papasan*, 478 U.S. at 276-277. Indeed, in the Eleventh Amendment setting the Court has concluded that the line between prospective and retrospective relief is the appropriate one to use in reconciling competing constitutional concerns, explaining that federal relief is available in

> cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation. As we have noted: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."

Papasan, 478 U.S. at 277-278, quoting *Green*, 474 U.S. at 68.

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[18] Declaratory relief is available in federal court under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). The question whether Commerce Clause claims are cognizable under 42 U.S.C. § 1983 is now pending before the Court in *Lewis v. Continental Bank Corp.*, No. 87-1955, and it therefore is an open question whether Section 1983 authorizes equitable relief against state officials for violations of the Clause; if it does not, such relief is likely available under a *Bivens* theory. See page 16, *supra*. We note, however, that Congress itself has taken action to foreclose certain avenues of relief against the States. Even if Section 1983 is held applicable to Commerce Clause claims, Congress chose not to make States liable under that statute. *Will*, 109 S.Ct. at 2308-2311; *Quern v. Jordan*, 440 U.S. 332 (1979). And the Tax Injunction Act, 28 U.S.C. § 1341, bars federal courts from enjoining the collection of state taxes.

Finally, and perhaps most significantly, regulation of commerce is textually committed to Congress by the Constitution; Congress may expand or contract limitations on commerce as it sees fit. This Court thus held in *Union Gas* that Congress's Commerce power includes the authority to create actions against the States for money damages. See 109 S.Ct. at 2284-2285 (plurality opinion). The creation of remedies for fundamentally unfair activity on the part of the States, or the sort of frustration of Commerce Clause policies that is hypothesized by petitioners (see ATA Br. 19-20), is therefore appropriately left to congressional action.

C. This Court Should Not Create A General Right To Refunds Of Taxes Collected In Violation Of The Commerce Clause.

Even if we are wrong in concluding that the availability of money damages in a state court action against a State *necessarily* is a matter of state law, the Court need not create and apply its own retrospectivity rules. As we noted in our first brief (at 16-19), questions of remedy that arise in state causes of action typically are resolved by state courts under their own rules. There is, moreover, nothing novel in the idea that state rules should govern the availability of remedies even in cases involving the effectuation of federal constitutional rights. See, *e.g.*, *Owens v. Okure*, 109 S.Ct. 573 (1989); *Wilson v. Garcia*, 471 U.S. 261 (1985). Because there is no constitutional imperative requiring the use of a uniquely federal remedy here, we believe that it would be appropriate for the Court generally to allow the States to apply their own refund rules in cases involving the Commerce Clause.

1. As a preliminary matter, compelling prudential concerns militate against this Court's creation of a damages remedy against the States. Even if the enactment of state refund statutes means that sovereign immunity is not squarely applicable here, the policies that underlie the doctrine retain constitutional stature; in a case where

the state courts find money damages unavailable, those policies should make any federal court, including this one, reluctant to take the unprecedented step of creating a monetary remedy against a State. That is particularly so when *Congress* chose not to make States liable for money damages in enacting the principal vehicle for the enforcement of federal constitutional rights, 42 U.S.C. § 1983. See *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989). Moreover, the nature of the federal system does not require judicial creation of a monetary remedy: as the Court has recognized, "the availability of prospective relief of the sort awarded in *Ex Parte Young*[, 209 U.S. 123 (1908),]" suffices to "give[] life to the Supremacy Clause." *Green*, 474 U.S. at 68. At the same time, institutional considerations suggest that the Court should hesitate before constitutionalizing the rules governing money damages—a course that would require the Court to assess the validity of every state retroactivity and remedial rule,[19] and that would transform every denial of a federally based claim for a tax refund into a constitutional case that could be brought to this Court.

The peculiarity of such an approach is visible here. The ATA petitioners evidently recognize that, whatever law applies, a tax refund should be unavailable when there has been no actual discrimination or duplicative taxation (see Br. 27), or where the taxpayer has succeeded in passing a discriminatory tax on to its customers (see Br. 25). Petitioners also seemingly recognize that equitable considerations would bar a refund when a retrospective remedy would impose an undue burden on the State. ATA Br. 22 ("the issue of refund relief will not even arise unless the financial burden argument already has been found wanting"). Yet those are precisely the considerations on which the court below relied in denying a refund. Pet. App. 21a. Petitioners, in acknowledging the validity of these factors, are essentially asking this Court to do nothing more than review the state court's fact-bound and discretionary conclusions on these points.

[19] As we noted in our first brief (at 17 n.11), such rules naturally differ from State to State.

2. Nothing in the Commerce Clause requires this Court to accept petitioners' novel invitation. As we explained in our first brief (at 17-18, 24-25), when a constitutional challenge involves a denial of equal treatment—that is, when the State had authority to impose the challenged tax on the plaintiff at the challenged level, and erred in not *also* taxing someone else at that level—this Court generally has found a prospective remedy adequate to effectuate the Constitution. Thus, in equal protection and related challenges involving a range of state activities, from taxation to the award of benefits to the adjustment of private rights, the Court has left it to state courts to determine whether constitutional defects should be remedied by expanding or contracting the pool of beneficiaries. See *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. at 895-896 (plurality opinion); *Hooper*, 472 U.S. at 624; *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980); *Orr v. Orr*, 440 U.S. 268, 272 (1979); *Stanton v. Stanton*, 421 U.S. 7, 17-18 (1975). See also *Williams v. Vermont*, 472 U.S. 12, 28 (1985); *Exxon Corp.*, 462 U.S. at 196-197. Cf. *Heckler v. Mathews*, 465 U.S. 728, 739, 740 n.8 (1984); *Califano v. Westcott*, 443 U.S. 76, 93-95 (1979) (opinion of Powell, J.).

The ATA petitioners maintain that these decisions leave to the States only the ability to fashion appropriate prospective relief, and that "nothing in them rules out the potential need for retrospective relief." Br. 10 n.5.[20]

[20] In arguing that prospectivity is not adequate, the ATA petitioners suggest that refunds surely would be in order to remedy a hypothetical tax that discriminates on the basis of race or gender. Br. 10-11 n.5. But one can accept petitioner's proposition without abandoning the Court's conclusion that prospectivity generally offers adequate relief. If the Court in fact has discretion to formulate refund remedies as a matter of federal law, it plainly may exercise equitable discretion in doing so; the judgment that prospective relief usually "gives life to the Supremacy Clause" (*Green*,

Yet the Court has made clear that "the government could deprive a successful plaintiff of *any monetary relief* by withdrawing the statute's benefits from both the favored and the excluded class." *Mathews*, 465 U.S. at 739 (emphasis added) (footnote omitted). If States (or the Federal Government) that follow this course nevertheless generally are required to take the extraordinary additional step of retroactively reclaiming the benefits paid to the favored group, it is surprising that the Court never has so much as hinted at such an obligation.[21]

3. The adequacy of prospective relief is particularly apparent in the Commerce Clause setting. Because the Clause was not designed for the benefit of individuals, nothing in its policies should move the Court to override the State's decision to withhold monetary relief. Indeed, the Court expressly has contrasted the purposes served by the Commerce and Equal Protection Clauses in this regard, noting that they "perform different functions in

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474 U.S. at 68) might be overcome in the grotesque circumstances imagined by petitioners.

[21] In fact, there is reason to believe that the Court did not have such an understanding of the States' obligations. States often have challenged the plaintiffs' standing in refund suits, arguing that the remedy for unconstitutionally disparate treatment under state law would be elimination of the tax exemption for the favored class, and that success on the constitutional challenge accordingly would bring the plaintiff no relief. If there were an absolute right to retrospective equality, as petitioners here maintain, the existence of that right would answer the States' standing arguments; the meaning of state law would be irrelevant. But the Court has given a different answer. It has reasoned that the appropriate remedy for an underinclusiveness challenge is a matter of state law to be decided by the state courts on remand—and that the possibility of a favorable ruling on state law after remand keeps the case live pending resolution of the federal constitutional challenge. See *Texas Monthly*, 109 S.Ct. at 896 (plurality opinion), citing *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *Arkansas Writers' Project*, 481 U.S. at 227, citing *Orr*, 440 U.S. at 273. There would have been no need for the Court to engage in this reasoning had it believed that the Constitution requires retrospectivity as a remedy.

the analysis of the permissible scope of a State's power—one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States." *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985) (footnote omitted). We argue this point at length in our first brief (at 21-23), and in our brief in *Lewis v. Continental Bank Corp.*, No. 87-1955, now pending before the Court; we therefore do not repeat our discussion of the issue here. The deterrence and equitable arguments advanced by ATA (Br. 18-24) also are addressed adequately in our first brief (at 12-16).

One of the ATA petitioners' comments on the nature of the Commerce Clause, however, does demand an additional response. The availability of declaratory and injunctive relief against Commerce Clause violations, petitioners assert, "is a complete answer to the contention that affirmative relief may never be awarded at the instance of those victimized by such violations." Br. 17. The ATA petitioners plainly are correct, of course, in stating that they have suffered injury in fact sufficient to confer standing, and that they may seek equitable relief to enforce the Clause. That proposition, however, does not establish either that the Commerce Clause was specifically designed to benefit persons in their position or that the policies of the Clause require monetary compensation as a remedy.

In fact, a plaintiff may maintain an action to enforce a statutory or constitutional provision of which he was not an intended beneficiary. The Court has made clear, for example, that a plaintiff may satisfy even the so-called "zone of interests" prudential limitation on standing, at least in a statutory action under the Administrative Procedure Act, 5 U.S.C. § 702, when there is "no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399-401 & n.16 (1987).[22] For present purposes, however,

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[22] This principle explains the decision in *Davis v. Michigan Dept. of Treasury*, 109 S.Ct. 1500 (1989), cited by ATA at Br. 17 n.8. We note that nothing in *Davis* suggests that taxpayers injured by

the important question *does* concern the purposes of the Clause; and, as we explain in our first brief, the Clause was designed to serve national rather than individual ends.

II. THE DUE PROCESS CLAUSE DOES NOT PRECLUDE A STATE FROM REMEDYING THE EFFECTS OF A DISCRIMINATORY TAX BY RETROACTIVELY RAISING THE TAXES OF PERSONS WHO BENEFITTED FROM THE DISCRIMINATION.

1. If the Commerce Clause does require retrospective equalization, the answer to the Court's second question is plain: in at least some circumstances, a retrospective increase in the taxes of those benefitted by the discrimination is a proper form of relief. At the outset, such an increase surely would suffice to cure the Commerce Clause violation. As the Court has made clear in the equal protection context, persons in petitioners' circumstances (who do not deny the State's power to tax them but argue that the tax levels unconstitutionally favored another category of taxpayer) are entitled only to "equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Mathews*, 465 U.S. at 740. If this requirement of equal treatment extends into the past, a State may satisfy it by imposing a retroactive burden on the favored class, granting offsetting prospective benefits to the disfavored class, or by any combination of the two. Petitioners do not dispute this point. See McKesson Br. 25; ATA Br. 7.

It also is clear that retroactive tax increases do not, by their nature, deny due process to the persons whose taxes are increased. The Court's " 'cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.

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a violation of intergovernmental immunity doctrine are entitled to refunds as a matter of federal law; because the State conceded the availability of a refund, the issue was not before the Court in that case. *Id.* at 1508.

* * * This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.' " *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728-730 (1984), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). The Court thus held that retrospective legislation satisfies the requirements of due process "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means." *R.A. Gray*, 467 U.S. at 729. See *id.* at 730; *Turner Elkhorn Mining*, 428 U.S. at 18. In the tax setting in particular, "[l]iability for taxes under retroactive legislation has been 'one of the notorious incidents of social life' " (*Untermyer v. Anderson*, 276 U.S. 440, 450 (1928) (Brandeis, J., dissenting) (citation omitted)); the Court therefore consistently has upheld retroactive taxes unless they are "so harsh and oppressive as to transgress the constitutional limitation." *Welch v. Henry*, 305 U.S. 134, 147 (1938). See *United States v. Hemme*, 476 U.S. 558, 568-569 (1986).[23] Applying this principle, this and other federal courts repeatedly have upheld retroactive tax legislation,[24] as petitioner McKesson recognizes. See Br. 19-24.

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[23] We do not understand the Court to have created a separate test for the subset of retroactivity cases involving taxation. Thus the decision in *R.A. Gray* relied for the formulation of its rule on the Court's holdings in *Welch v. Henry*, *supra*, and *United States v. Darusmont*, 449 U.S. 292 (1981), decisions involving retroactive taxation. See 467 U.S. at 730, 731. See also *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.3 (1977).

[24] See, *e.g.*, *United States v. Darusmont*, *supra*; *Welch v. Henry*, *supra*; *United States v. Hudson*, 299 U.S. 498, 499 (1937); *Reinecke v. Smith*, 289 U.S. 172, 175 (1933); *Milliken v. United States*, 283 U.S. 15, 23 (1931); *Cooper v. United States*, 280 U.S. 409, 411 (1930); *Lynch v. Hornsby*, 247 U.S. 339 (1918); *Brushaber v. Union Pacific R.*, 240 U.S. 1, 20 (1916); *Stockdale v. The Insurance Cos.*, 87 U.S. (20 Wall.) 323, 331 (1873); *DeMartino v. Commissioner*, 862 F.2d 400, 408 (2d Cir. 1988); *New England Baptist Hospital v. United States*, 807 F.2d 280, 284-285 (1st Cir. 1986); *Estate of Ekins v. Commissioner*, 797 F.2d 481, 484-485 (7th Cir. 1986); *Fein v. United States*, 730 F.2d 1211, 1213 (8th Cir.), cert.

Against this background, a retroactive tax on the beneficiaries of Florida's unconstitutional tax preference would appear to satisfy the requirements of due process. It would be the most precisely targeted and effective method of curing unconstitutional state action—and thus surely would be a rational way of furthering a legitimate state purpose. See *Turner Elkhorn*, 428 U.S. at 42 (opinion of Powell, J.). Retroactivity would not unfairly involve the imposition of an entirely new and unanticipated form of taxation; all wine and liquor sales in Florida were subject to some sort of tax, while the validity of the tax preferences was the subject of ongoing litigation from their inception. See *United States v. Darusmont*, 449 U.S. 292, 298-300 (1981). The retroactive levy would be imposed, not on a gratuitous action such as the conveyance of a gift (which a taxpayer might have avoided had he anticipated taxation), but on a commercial transaction that presumably would remain profitable even if subject to a reasonable tax. See *Welch*, 305 U.S. at 148; *United States v. Hudson*, 299 U.S. 498, 500 (1937). And the tax need not extend into the distant past since, as petitioner McKesson seems to acknowledge (Br. 28), the requirements of the Commerce Clause would be satisfied by a retroactive increase that goes only to the limits of the statute of limitations for tax refunds.

2. Petitioner McKesson nevertheless offers two arguments against the use of a retroactive tax in this case: that five years is too long a period of retroactivity (Br. 28), and that the State in any event has been insufficiently prompt in implementing a retroactive increase (Br. 26-27). Both arguments misunderstand this Court's decisions. Neither this nor any other federal court ever has imposed an absolute due process time limit on the acceptable period of retroactivity. See *Temple University v.*

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denied, 469 U.S. 858 (1984); *Reed v. United States*, 743 F.2d 481, 485 (7th Cir. 1984), cert. denied, 471 U.S. 1134 (1985); *Ward v. United States*, 695 F.2d 1351, 1354 (10th Cir. 1982); *Purvis v. United States*, 501 F.2d 311, 313 (9th Cir. 1974).

United States, 769 F.2d 126, 135 (3d Cir. 1985), cert. denied, 476 U.S. 1182 (1986). Indeed, in the setting of so-called "corrective taxes," in which the legislature retroactively authorizes taxes that were illegal when collected, the Court has approved retroactive legislation reaching back more than 10 years. See, *e.g.*, *Van Emmerik v. Janklow*, 304 N.W.2d 700 (S.D. 1981), appeal dismissed for want of a substantial federal question, 454 U.S. 1131 (1982).[25]

In arguing that Florida did not promptly enact corrective legislation, petitioner McKesson seemingly contends that the State should have imposed a retroactive tax during the course of this litigation. See Br. 24, 25. In petitioner's view, a State must enact such a tax at the time that its taxing scheme is challenged, or forever lose its right to pass corrective legislation; if the tax scheme ultimately is held to be constitutional, petitioner asserts, "the state may, if it chooses, retroactively restore the permissible preference." Br. 25. In our view, this juggling of tax liability would be an uncommonly silly method of adjusting tax burdens, and its use is not constitutionally compelled. When the unconstitutionality of a State's statute and its liability for retroactive relief are settled, it is time enough for the State (through its courts or legislature) to determine an appropriate remedy. That is made clear by this Court's repeated practice (in the cases cited above, at 23) of remanding cases to the state courts for a determination of remedy after a constitutional challenge is finally resolved.

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[25] Petitioner McKesson contends that *Welch v. Henry* recognized two years as the limit of permissible retroactivity. In fact, the language quoted by petitioner for this proposition (Br. 28-29) was taken from the opinion of the state court in that case. In full, this Court's observation was that, "[w]hile the Supreme Court of Wisconsin, [223 Wis. 319, 217 N.W. 68, 72] thought that the present tax [which reached back two years] might 'approach or reach the limit of permissible retroactivity', we cannot say that it exceeds it." 305 U.S. at 151. This Court itself expressed no view on the outer bounds of acceptable retroactive legislation.

3. Having said that, in our view it would be inappropriate (or impossible) for the Court now to settle definitively the constitutionality of a retroactive tax on the beneficiaries of Florida's unconstitutional preferences. "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid" (*Welch*, 305 U.S. at 147); doing so here would require an examination of the operation of the tax, its incidence (whether on retailers, distributors, or wholesalers), and other details that must be matters of speculation. Moreover, whatever constitutional defects might lie in a retroactive tax involve its impact on the past beneficiaries of the preferences, not on petitioner McKesson. Those beneficiaries, however, are not parties to this proceeding and are not in a position to assert in this Court whatever rights they may have. We therefore believe that—if the Court finds retrospective equalization constitutionally compelled—it would be enough to leave use of a retroactive tax available as an option for the State on remand.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

BENNA RUTH SOLOMON *
Chief Counsel
CHARLES ROTHFELD
STATE AND LOCAL LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
* *Counsel of Record for the*
Amici Curiae

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